No. 17426.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL ROY PEREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

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Jurisdictional Statement.

On January 30, 1961, appellant executed a consent to proceeding under the Federal Juvenile Delinquency Act pursuant to the provisions of Title 18, United States Code, Sections 5031-5034 [C. T. 4].* On the same date, an Information was filed by the United States Attorney in the United States District Court for the Southern District of California, Central Division, charging appellant with being a juvenile delinquent and committing the offense of juvenile delinquency, in that, with intent to defraud the United States, he uttered and published as true a certain U. S. Treasury check, bearing forged endorsements of the payees thereon, as appellant well knew [C. T. 2]. After arraignment and his plea of not guilty, appellant,

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*"C. T." refers to Clerk's Transcript of Record.

having waived trial by jury, was tried by the Honorable Ernest A. Tolin on March 13, 1961, and thereafter was convicted and adjudicated as charged in the one-count Information [R. T. 64]. On March 27, 1961, appellant was placed on probation for the period of his minority, which was to expire on December 25, 1963 [C. T. 5A]. On March 29, 1961, a motion for a new trial was filed in the District Court [C. T. 6], and on April 3, 1961, such motion was noticed for hearing [C. T. 8]. On April 17, 1961 and on May 1, 1961, the motion was heard by Judge Tolin, argued by counsel, and was denied [R. T. 86].

Jurisdiction of the trial court was based on Title 18, United States Code, Sections 3231 and 5031-5033, inclusive. Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

Statement of the Case.

Insofar as not stated in the jurisdictional statement the case is as follows:

Appellant has raised three points on appeal in the Topical Index of his brief:

> ". . . II Evidence was submitted in connection with the motion for new trial which removed the element of 'Flight' from the case, and showed that witness Lira was unreliable.
>
> "III The trial court committed serious error in not granting the motion for new trial—the offered evidence, if believed by the trier of fact, would exonerate Perez, by destroying the circumstantial evidence against him and impeaching the sole material witness' direct evidence.

"IV The court has erroneously failed to grant the motion for new trial in the interest of justice as it does not serve the purpose of justice, or of the Act under which he was tried, for the juvenile defendant to be found guilty because he failed to comprehend the date on which it was said that he committed his crime." . . .

Statutes and Rule Involved.

Title 18, United States Code, Section 495, provides, in pertinent part, as follows:

". . . Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; . . .

". . . Shall be fined . . . or imprisoned . . ."

Title 18, United States Code, Section 5032, provides as follows:

"A juvenile alleged to have committed one or more acts in violation of a law of the United States not punishable by death or life imprisonment, and not surrendered to the authorities of a state, shall be proceeded against as a juvenile delinquent if he consents to such procedure, unless the Attorney General, in his discretion, has expressly directed otherwise.

"In such event the juvenile shall be proceeded against by information and no criminal prosecution shall be instituted for the alleged violation."

Title 18, United States Code, Section 5033, provides as follows:

> "District Courts of the United States shall have jurisdiction of proceedings against juvenile delinquents. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The proceeding shall be without a jury. The consent required to be given by the juvenile shall be given by him in writing before a Judge of the District Court of the United States having cognizance of the alleged violation, who shall fully apprise the juvenile of his rights and of the consequences of such consent. Such consent shall be deemed a waiver of a trial by jury."

Rule 33, Federal Rules of Criminal Procedure, Title 18 United States Code, provides as follows:

> "The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

Statement of Facts.

Appellant and appellee entered into a stipulation of facts at the outset of the trial [R. T. 4-5],* which in essence was as follows:

That U. S. Treasury check No. 16,267,614 made payable in the amount of $72.00, to Porfirio M. and Marceline M. Andrade, was drawn over Symbol 9012 as a Social Security check;

That said check was never received by either of the payees;

That neither of the payees endorsed said check with either of their names;

That neither of the payees authorized anyone else to endorse either of their names;

That the check in fact bore the purported endorsements of both of the named payees on the reverse side thereof;

That the check was cashed at the Belvedere Park Grocery, 522 North Brannick, Los Angeles, California, which second endorsement also appeared on the reverse side of the check;

That a handwriting analysis had been made of the purported endorsement and compared with exemplars of the appellant's handwriting and that such analysis indicated that the spurious endorsement was not signed or written by the appellant.

The issue was thus narrowed for the trial court as to whether or not appellant in fact uttered and published the check as charged.

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*"R. T." refers to Reporter's Transcript of Proceedings in the trial court.

Primo Lira is the owner of the Belvedere Park Grocery in East Los Angeles. Mr. Lira testified that appellant came into his store during August of 1959 and presented a check to his clerk in order to pay for some soda pop and candy [R. T. 12, 13]. Lira, who was standing nearby, recognized appellant as a customer who had been in the store often [R. T. 13]. When the clerk handed Lira the check for his approval, Lira asked the appellant "whose check is this?" [R. T. 13]. The appellant told him that it was his uncle's and that he had worked in his uncle's yard helping to take a tree out and that the uncle had given him the check [R. T. 13]. Lira did not ask appellant for any identification inasmuch as ". . . I knew him. He used to come over there and trade all the time" [R. T. 22].

Lira further testified that although he recognized appellant as a customer he did not learn his true name until after the check was cashed and one of the boys working in the store told him the name [R. T. 19].

Lira further noted that "before he cashed the check I used to see him two or three times a week . . . not afterward. He used to come with some other boys and he used to be in the car outside and the other boys used to come in the store and buy some merchandise . . . after the check was cashed . . ." [R. T. 17].

Appellant's attorney sought to have Lira admit alleged prior inconsistent statements wherein he was supposed to have told the Secret Service agent that appellant had not been in the store the day the check

was cashed and also that he had told some other person or persons that appellant had written his name or something else on the back of the check [R. T. 28]. Lira denied ever making such a statement or statements and no further testimony or evidence was thereafter introduced to rebut his denial [R. T. 28]. Lira's daughter was also present in the store on the day the check was cashed and saw appellant and thereafter observed her father walking by her with a check in his hand [R. T. 43, 51]. Inasmuch as she was in another part of the store behind the meat counter, she was unaware of any further details [R. T. 48, 51].

Appellant's attorney sought information from Lira's daughter about his alleged drinking on the day in question [R. T. 46, 48]. In response to the question, "Had your father been drinking that day?" She responded, "Not that I remember." [R. T. 48]. No further evidence was sought to be introduced on this point.

Secret Service Agent Kenneth B. Thompson testified that he interviewed Lira and his daughter on June 20, 1961, and that earlier on January 6, 1961, he interviewed appellant at his home during the morning in the presence of appellant's mother. At this time appellant disclaimed knowledge of any facts relating to the subject check or that he knew where the Belvedere Park Grocery was, or that he had ever been there [R. T. 8, 9, 10, 11]. Subsequently, at a later interview the same day Thompson, appellant and appellant's

mother drove to the subject market and while enroute appellant remembered where the particular market was and admitted that he had been there many times [R. T. 9, 11].

Appellant testified that he had never seen the subject check prior to having been shown same by Agent Thompson [R. T. 62]. He also denied taking the check to Lira's market or cashing it or telling Lira anything about chopping wood for an uncle [R. T. 58]. Appellant testified further that Lira identified him when Thompson took him to the market and that Lira said at that time, referring to Appellant, "That is the one that cashed the check." [R. T. 58]. He further testified that "I told him it wasn't I and that I had never cashed a check there. I had told him to be sure if he had ever been drinking, maybe sometimes that would happen, why should he accuse me." [R. T. 58, 59]. Appellant explained that he had gone into Lira's store "mostly on week-ends . . . to buy beer" and also occasionally during the week [R. T. 59, 60, 61]. On cross-examination, appellant admitted knowing one of the payees, Porfirio Andrade, and that Mr. Andrade lived about three doors away from him and that Andrade could hardly talk or walk [R. T. 59, 60]. He testified that although he had never seen Lira drink, he had seen him "drunk" on *one* occasion when he was making a purchase at the store [R. T. 61].

Appellant was the only defense witness at the trial and at no time was any reference made to either of the

two affiants who subsequently submitted affidavits which were used by appellant in his motion for a new trial.

Summary of Argument.

Appellant attempted to introduce, as the basis for a motion for new trial, information concerning events and attitudes of himself and a key government witness, which information, by its very nature, must have been available to him long before his trial in the District Court. At most, this information, even if found to have been unavailable to appellant, after due diligence in being advised of same, would have been cumulative of evidence already presented during the trial or an attempt to impeach the government's witness. Such would-be testimony was properly excluded from the court's reasoning, in its determination to deny the motion, based on its belief that the evidence at the trial had proven appellant's guilt beyond a reasonable doubt.

ARGUMENT.

I.

The Sole Question Raised on Appeal Is Whether or Not the Trial Court Erred in Not Granting Appellant's Motion for New Trial Based on Certain Alleged Newly Discovered Evidence.

Appellant's original motion dated March 28, 1961, included five grounds on which appellant based said motion [C. T. 6]. Of those five grounds appellant has chosen to assign error to the trial court in its denial of the motion solely on the basis of the fifth ground, which reads as follows:

> ". . . 5. Newly discovered evidence which could not on the exercise of reasonable diligence have been adduced at the time of trial." [C. T. 6].

None of the five grounds of appellant's motion claimed that a new trial should be granted to appellant "in the interest of justice" and such contention cannot be raised for the first time on appeal.

Although appellant has stated in his notice of appeal that he was appealing "from the above judgment and from the order denying motion for a new trial" [C. T. 24], no effort has been made in appellant's Brief to assign error to the trial court arising out of the actual trial of the case.

The sole remaining issue for this Court to determine is whether or not the trial court made an improper decision in denying appellant's motion for a new trial based on certain "newly discovered evidence."

At the time of sentencing appellant, the trial judge told him that:

> ". . . the endorsement was forged and it was just to my mind impossible to come to a conclusion you didn't take the check in there and cash it . . ."; [R. T. 72].

and, prior to denying the motion for new trial, he commented:

> "Now the principal witness was a storekeeper. There was a suggestion in the evidence that he was intoxicated at the time he took this check and hence could not remember correctly or could not observe correctly. It wasn't proven that he was so and it seemed to me there was some corroboration to his story and it tied in with all the other evidence in such a way that the interlocking of evidence established beyond a reasonable doubt that Daniel Roy Perez did utter the forged check." [R. T. 86].

It is submitted that the trial judge properly exercised his discretion in ruling on the motion, and that the attitude of this Court in *Jeffries v. United States,* 215 F. 2d 225, 226 (9th Cir. 1954) should control the outcome of this appeal. It was there stated:

> "It should be noted that the judge who passed upon and denied this motion had tried the case and heard all of the evidence. As in *United States v. Johnson,* 327 U. S. 106, 112 . . . we must say that: 'Consequently, the trial judge was exceptionally qualified to pass on the affidavits'. The trial judge was not obliged to believe the affidavit or to accept it as face value . . . We assume, as the

record requires us to do, that the trial judge in denying the motion, found the facts against the appellant. We hold that such findings are within the competence and discretion of the trial judge who might well conclude that the facts disclosed at the trial were so convincing that Carroll's affidavit was unworthy of credit."

The court further pointed out, quoting from *Johnson* (internally cited, *supra*):

" 'While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them.' "

II.

The Affidavits in Support of Appellant's Motion for a New Trial Contain Reference to Facts Which Were Well Known to Appellant at the Time of Trial and Do Not Constitute Newly Discovered Evidence Within the Meaning of Rule 33, Federal Rules of Criminal Procedure.

Appellant submitted three affidavits to the trial court as supporting documentation to his motion for a new trial [C. T. 10, 15, 19]. One was his own [C. T. 10] and the other two (of Louis Ocana [C. T. 19] and Frank Gomez [C. T. 15]) were of friends who had known appellant for six and three years, respectively.

The "newly discovered evidence," contained in these affidavits, on which appellant based his motion was, in essence, as follows:

1. That appellant was confused or mistaken as to the date of the offense which he was charged as having committed.

2. That during the Christmas season of 1959, and on other occasions, Primo Lira extended warm hospitality to appellant and his friends and that such hospitality was inconsistent with Lira's testimony: (a) that appellant "had cheated him," and (b) that appellant had not returned to the store after the alleged passing of the check.

3. That Primo Lira "drank".

4. That Primo Lira cursed and used obscenities.

5. That in July of 1960 Primo Lira acknowledged to appellant that he was not the person who gave him "a phony bill" but that "it must have been someone who looks something like . . . (appellant) . . ."

6. That Lira, who sold beer to minors, should be disbelieved as a witness.

7. That subsequent to August 1959, when the check was cashed at Lira's store, appellant and his friends continued to enter the store on numerous occasions.

8. Hearsy testimony from Ocana as to Lira's alleged exculpatory remarks to appellant and as to Lira's drunken state of being.

9. Miscellaneous other statements designed to attack Lira's character.

10. That Lira was drunk on three occasions when one or more of the affiants was in the store and that on such occasions appellant was present.

A. The "Evidence" in the Three Affidavits is Not "Newly Discovered"

The affidavits themselves indicate that the three affiants had been good friends long before the date of the offense charged in the Information. Appellant did not testify himself or offer any testimony or evidence whatsoever regarding any of these newly alleged contentions, other than that he had seen Lira "drunk" once and had gone to his store to purchase beer.

Thus, for the first time, after the completion of the trial, appellant sought to present information as to facts, which if true, were well known by him prior to the trial, and could well have been included, where relevant, as a part of his defense.

In *Shibley v. United States,* 237 F. 2d 327, 332 (9 Cir. 1956), cert. denied, 352 U. S. 873 (1956), rehearing denied 352 U. S. 919 (1956), the court found absence of error by the trial court in its denial of such a motion when the defendant had been aware of the existence of the potential witness, and of what her testimony might have been expected to be and pointed out:

> "One cannot speculate on failure to call a witness and thereafter present such testimony as newly discovered evidence."

Similarly, in *Prlia v. United States,* 279 F. 2d 407, 408 (9 Cir. 1960), the court said:

> "(There was) . . . no showing that the purported 'newly discovered evidence' was not available to the appellant before or during his trial, or discoverable during the more than three months between appellant's arrest and his trial . . .

> (T)here was no showing of due diligence to explain why the evidence proffered after the trial could not have been presented at it. . . ."

See also *United States v. Bertone,* 249 F. 2d 156 (3 Cir. 1957); *Brandon v. United States,* 190 F. 2d 175 (9 Cir. 1951); and *Fiorito v. United States,* 265 F. 2d 658, 659 (9 Cir. 1958).

Appellant claims he and his family were confused as to the date of the offense and that they did not realize that August 1959 was the crucial time rather than August of 1960 as he "imagined." This contention is untenable for numerous reasons: (1) Appellant waived indictment on January 30, 1961, after having been advised of the charges against him regarding an alleged offense occurring on *August 21, 1959,* and he consented to a proceeding against himself under the Federal Juvenile Delinquency Act. He was thereafter arraigned in open court on an Information filed the same day charging him with a violation of the Federal Juvenile Delinquency Act; (2) Appellant pleaded, not guilty to this offense on February 6, 1961; (3) Appellant was represented by retained counsel prior to and during his trial and was present in court during the trial when references were repeatedly made to *August 1959* as the relevant time.

Even if appellant's belated claim of confusion as to the date of the charged offense were true such contention does not explain his failure to rebut testimony at the trial about the offense or to introduce the other matter contained in the various affidavits. Why did appellant testify that he saw Lira drunk only once when the affidavits speak of his presence on three of such occasions? Was the episode of Lira's exculpatory re-

marks or the alleged Christmas Season conviviality forgotten by him during the trial? Certainly these matters would have demanded an explanation from Lira if he were cross-examined on the stand in such regard. To permit an eppellant to read the transcript of the trial, ascertain the weak points of his case, and then seek further relief with a totally new presentation is not the purpose of this type of motion. At the trial the most appellant did was to deny the offense, claim he had seen Lira drunk once, with no attempt to even rebut Lira's testimony that he had not returned to the store after he cashed the check. None of the other suggested "newly discovered evidence" was even hinted at or suggested during the course of the trial. Appellant seeks to explain his failure to use *any* of this "evidence" with this analog:

> "People have walked over oil fields for hundreds of years without anyone appreciating the significance of the lands. So it is with this evidence; no one realized that the apparently mundane facts in the affidavits were significant, the evidentiary content thereof was newly discovered." (A. B. 8.)

Appellee submits that these "oil fields" were gushers, if they existed at all, and appellant would have been soaked with the information.

In *Mejia v. United States,* No. 16873 (9th Cir. 1961), cited by appellant, the defendant at least tried to find his witness and to produce that testimony as evidence for the trial. Here, appellant did nothing until after the conclusion of the trial and the adverse result to him. The "gamesmanship—sporting event" reference in appellant's brief is an improper comparative. *Mejia,* allegedly was in good faith and tried to

produce his witness whereas appellant here has shown no such similar effort. The court pointed out in *Mejia* that if the missing witness, whose testimony was the principle item of newly discovered evidence, had been present at the trial, his testimony, if true, would have established an alibi for appellants. But the court emphasized in its footnote (p. 5 of Slipsheet Decision):

> "We decide this case on the special and peculiar facts here before us and find it unnecessary to state any such broad rule as that expressed by way of dictum in *Cleary v. U. S.*, 9 Cir., 163 F. 2d 748, 749, as follows:
>
> 'It is obvious that if the evidence, so claimed to show the alibi were actually newly discovered, it was a matter for the jury and not for the judge to consider its weight against the testimony of the complaining witness.' "

What appellant has sought to do is to try a new theory of attack against the complaining witness and to rebut the evidence clearly established against him. He did not suffer "the mistake" of inability to accurately describe his alibi witness as was the case with Mr. *Mejia*.

Appellant has further cited *United States v. Johnson*, 149 F. 2d 31 (7 Cir., 1945), in support of his claim for relief. In that case the court noted at page 44, that a new trial should be granted when:

> "(a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> "(b) That without it the jury might have reached a different conclusion.
>
> "(c) That the party seeking a new trial was

taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

Appellant has referred to this essential language on pages 12 and 13 of his brief and even underlined the last clause. Even if conditions (a) and (b) were clear and plausible, which, it is submitted, they are not, wherein can appellant support the claim of lack of knowledge of Lira's alleged falsity? The affidavits themselves furnish the answer by their very fabric.

It is respectfully submitted that appellant was clearly aware of the existence of all of the facts contended to be newly discovered and that he has not shown true diligence or any diligence or effort whatsoever in marshaling such evidence and presenting it to the court during the trial.

B. The Matter Contained in Each of Appellant's Supporting Affidavits Is at Most Cumulative and an Attempt to Impeach a Government Witness.

The main theme of each of the three affidavits is an attempt to impeach Primo Lira's testimony by showing a tendency on his part: to drink liquor; to sell beer to minors; to be friendly to appellant after the alleged offense; and that he lied when he claimed appellant had not returned to his store as a customer after August 1959. Such testimony, if introduced at a trial could have served but a single purpose. It would be directed not at whether in fact appellant did utter and negotiate the forged Treasury check in question but rather would be an attempt to show that the witness Lira had made a prior inconsistent statement as to what his testimony was at the trial, or that he had

acted contrary to what his behavior might have otherwise been "expected" to be.

The real emphasis of appellant's brief is an attempt to show that the proffered evidence would have impeached Lira ". . . by showing that the truth was not in him . . ." (A. B. 9) or that the appellant had ". . . been found guilty on the unsubstantiated word of that locally noted drinker and purveyor of soft, medium and hard drink, Primo Lira . . ." (A. B. 16).

This Honorable Court has been confronted with this question on numerous occasions in the past and each time has answered in similar terms as those stated in *Pitts v. United States,* 263 F. 2d 808 (9th Cir. 1959), cert. denied, 360 U. S. 919 (1959), wherein it was noted that defendant had not complied with the requirements basic to a proposed offer of newly discovered evidence. At page 810 it was said:

> ". . . Third. It appeared from the motion that the evidence relied on was intended by appellant to show the falsity of testimony given by Simon and to corroborate testimony given by appellant at the trial of this case. Such evidence would have been merely cumulative and impeaching."

See also:

Wagner v. United States, 118 F. 2d 201 (9th Cir. 1941);

Brandon v. United States, 190 F. 2d 175 (9th Cir. 1951);

Balesteri v. United States, 224 F. 2d 915 (9th Cir. 1955);

United States v. Bertone, 249 F. 2d 156 (3rd Cir. 1957).

Appellant points out that:

> "The court judged a 'consciousness of guilt'; do not the true facts reveal a consciousness of innocence?" (A. B. 9.)

Thus far, the only "true facts" are those so found to be true by the trial court. Appellant had ample opportunity to rebut the inference of "flight" referred to by the trial judge at the time of trial yet remained silent. Now he seeks to show that a witness whose testimony supported that finding is unreliable and that he was lying.

Appellant did not claim confusion as to dates during the trial, nor that Lira was mistaken when he testified that appellant had not come into the store with his friends but remained outside in the car subsequent to the time of his offering of the check. The testimony was clear. Such testimony would quickly have reminded appellant and his attorney of the necessity of rebutting such testimony or of introducing evidence to contradict same, if such were factually available and true. Appellant's present contention is weak and based solely on his own statement. Similarly, is this "new evidence" sought to further the already attempted impeachment of Lira, by reference to his alleged drinking activities. This attack was already made during the trial, once by cross-examination of Lira's daughter and again, when on direct examination of the appellant, he testified that he had seen Lira drunk only *once*. Yet the information in the various affidavits contradicts appellant's own testimony. In the affidavits it appears that appellant had seen Lira drunk on at least *three* occasions, not merely *once* as testified by appellant during the trial. This "new evidence" would thus, if be-

lieved, impeach not only Lira but would necessarily impeach appellant's testimony as well.

It is submitted that these affidavits were belatedly offered to accomplish a task once failed and even then by a means which the trial court properly refused to influence its decision as to ruling on appellant's motion. These affidavits were designed solely to be cumulative of certain testimony given by appellant and as a further attempt to impeach the testimony of Primo Lira.

III.

Appellant's Contention That the Motion for a New Trial Should Have Been Granted in the Interest of Justice, to Further the Purpose of the Juvenile Delinquency Act, is Improperly Raised for the First Time on Appeal.

Rule 33 of the Federal Rules of Criminal Procedure provides that "The court may grant a new trial to a defendant if required in the interest of justice". As noted at the beginning of this brief the sole ground presented to the trial court, in appellant's written motion, which was subsequently made the subject of this appeal, was that related to "newly discovered evidence". No contention that the interest of justice required the court to so grant a new trial to appellant was ever raised below. How can the trial court be found to have erred in denying appellant's motion on this ground when such basis was never presented to it for determination?

Even if this court were to consider this issue, an analysis of the background of the allegation negatives the validity of the claim. Appellant entered into much philosophical discussion related to the fact that he was tried as a juvenile and that as such should have re-

ceived certain consideration and treatment different from that of a criminal trial. Appellant concludes his brief with the following comment:

> "The purpose of the Act under which defendant was tried is directed toward the welfare of the juvenile, not to his punishment. It does not serve the purpose of justice under this Act to exercise the authority of the court without allowing the defendant the protection of the court's procedure, in order to insure that he has the fullest possible opportunity to seek the justice which he has been taught to expect." (A. B. 19.)

Appellee is at a loss to follow the syllogism. Merely because the appellant is a juvenile and the Act is directed "toward his welfare" and not his punishment, is it appellant's suggestion that he thus be immune from some form of guidance or rehabilitation or even control if such be found necessary to curb his delinquent behavior? It is clear that a proceeding under the Federal Juvenile Delinquency Act results in the adjudication of a status rather than in the conviction of a crime. Further, a trial under the Act is not a criminal trial and a strict application of criminal rules, procedural or substantive, has been held to frustrate the purposes of the Act. In *United States v. Borders,* 154 Fed. Supp. 214, 216 (N. D. Ala., 1957), it was noted that in order to avoid the stigma of crime and the exact processes of a criminal trial, when dealing with delinquents, that:

> "Constitutional and statutory safeguards respecting defendants in criminal cases do not apply. The Federal Rules of Criminal Procedure, 18 U. S. C. A. . . . likewise do not apply so

> far as they are inconsistent with that Act. To sustain an adjudication of delinquency, most of the authorities require the same amount and kind of proof as would be required in an ordinary civil action."

See:

> Rule 54(b)(5), Federal Rules of Criminal Procedure.

The aforementioned *Borders,* decision was affirmed in 256 F. 2d 458, 459 (5th Cir. 1958), wherein it was pointed out:

> "That it is clear upon the record that the District Judge made adequate provision for looking after and protecting the substantial rights of the defendant under the statute . . . and that there was ample evidence to establish his guilt . . ."

But such matters in discussion are not properly before this court under the ground of the present appeal. No attack is made herein on the adjudication of appellant's status *per se* but rather on the trial court's alleged error in denying appellant's motion for new trial. In fact, the interest of justice has adequately been met by the procedures followed by the trial court and the defendant received every protection to which he was entitled by law or to which he would have been entitled in a criminal trial as an adult. Although these questions, regarding the "interest of justice" aspect of appellant's argument or regarding the peculiarities of a proceeding under the Federal Juvenile Delinquency Act, are thus outside the scope of this appeal, it is submitted that in fact, the evidence before the court properly supported its finding at the time of the trial and

that appellant was not prejudiced because of his youth, or otherwise, either at the trial or at the time of the hearing on the motion for a new trial.

Conclusion.

1. The allegations contained in the various affidavits submitted by appellant in support of his Motion for New Trial did not constitute "newly discovered evidence" within the meaning of Rule 33, Federal Rules of Criminal Procedure.

2. The information contained in these affidavits was at most merely cumulative and an attempt to impeach a Government witness.

3. The trial judge based his denial of Appellant's Motion for New Trial on a familiarity with all facts and testimony which had been presented during the trial, over which he presided.

4. The Motion for New Trial was properly denied.

5. The judgment of the trial court should be affirmed.

Respectfully submitted,

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